APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDERS

MEMORANDUM* OPINION
(FEBRUARY 7, 2023)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELISE BROWN, an individual,

Plaintiff-Appellant,

v.

COUNTY OF SAN BERNARDINO, a municipal entity; CITY OF CHINO, a municipal entity; MATTHEW GREGORY, Officer; MADALYN BRILEY, Officer; DOES, 3-10, inclusive,

Defendants-Appellees.

No. 21-56357

D.C. No. 5:20-cv-01116-MCS-SP

Appeal from the United States District Court
for the Central District of California
Mark C. Scarsi, District Judge, Presiding

Before: BERZON, R. NELSON, and BADE, Circuit Judges. Partial Concurrence and Partial Dissent by Judge R. NELSON.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

MEMORANDUM

Elise Brown alleges in this § 1983 action that City of Chino police officers Madalyn Briley and Matthew Gregory (collectively, "Defendants"), after they stopped her car on suspicion of vehicle theft, subjected her to excessive force and an unlawful arrest in violation of her Fourth Amendment rights. She appeals the district court's grant of summary judgment in favor of Defendants on qualified immunity grounds. Reviewing de novo, *Nehad v. Browder*, 929 F.3d 1125, 1132 (9th Cir. 2019), we affirm in part and reverse in part.

1. When evaluating a Fourth Amendment claim of excessive force, we ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them," keeping in mind three non-exhaustive factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[1] *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). "The most important factor is whether the suspect posed an immediate threat to the safety of the officers or others." *Thomas v. Dillard*, 818 F.3d 864, 889 (9th Cir. 2016).

[1] The first and third *Graham* factors are not disputed: we have previously concluded that "the crime at issue (stolen vehicle or plates) [is] arguably severe," *Green v. City & County of San Francisco*, 751 F.3d 1039, 1050 (9th Cir. 2014), and Brown was not resisting arrest or attempting to evade arrest by flight. Instead, she was completely compliant with the officers' instructions.

The officers initially acted reasonably by removing Brown from her car and ascertaining whether she was armed or posed a threat. However, after Brown complied immediately with all instructions, the officers confirmed she was not armed, and "there was no indication at the scene that [she] posed an immediate threat to the safety of the officers or others," *Green*, 751 F.3d at 1050, a jury could find that it was not reasonable for Defendants to believe that Brown—an 83-year-old, 5'2", 117-pound, unarmed, completely compliant woman—posed any immediate threat.[2] Therefore, a jury could find that it was not reasonable for Defendants to force Brown to her knees and handcuff her. *See id.*

As to whether the law was clearly established, "we need look no further than *Graham*'s holding that force is only justified when there is a need for force." *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 (9th Cir. 2007). When the *Graham* factors "do not support a need for force, '*any* force used is constitutionally unreasonable.'" *Green*, 751 F.3d at 1049 (quoting *Lolli v. County of Orange*, 351 F.3d 410, 417 (9th Cir. 2003)). And, under clearly established law in this Circuit, "the crime of vehicular theft . . . without more, does not support a finding that [the suspect] pose[s] a threat" justifying the use of force when the suspect is outnumbered, unarmed, and compliant.[3]

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[2] Sergeant McArdle testified that he told Brown, "obviously, you do not look like you were going to be a violent suspect."

[3] The dissent asserts that there are differences in the degree of force used in *Green* and the force used here. True, but beside the point. We rely on *Green* as clearly established law only with respect to whether the plaintiff posed an immediate threat solely by virtue of having been suspected of having stolen a car,

Id. at 1049-51. Therefore, the district court erred when it concluded that Defendants were entitled to qualified immunity as to the excessive force claim.

2. As to the unlawful arrest claim, even if Brown's detention rose to the level of an arrest, and even if Defendants lacked probable cause to arrest her, Defendants are entitled to qualified immunity because they did not violate a clearly established right.

Whether an unlawful arrest violated clearly established law depends on "whether it is reasonably arguable that there was probable cause for arrest—that is, whether reasonable officers could disagree as to the legality of the arrest such that the arresting officer is entitled to qualified immunity." *Sialoi v. City of San Diego*, 823 F.3d 1223, 1233 (9th Cir. 2016) (quoting *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1076 (9th Cir. 2011)). Brown relies solely on *Green* to argue that Defendants' conduct violated clearly established law. However, the analysis in *Green* is not applicable here because that case involved an unconfirmed, mistaken license plate match. 751 F.3d at 1045-46. *Green* thus did not provide adequate notice to the officers that Brown's arrest, based on a confirmed license plate match, violated a clearly established constitutional right. The district court did not err when it held that Defendants are entitled to qualified immunity as to the unlawful arrest claim.

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not with regard to whether the force used was reasonable or whether the level of suspicion with regard to having stolen a car was higher or lower. The facts indicating that the plaintiff in *Green* did not present an immediate threat are materially the same as the facts at issue here. *See Green*, 751 F.3d at 1048, 1050.

AFFIRMED IN PART and REVERSED IN PART.[4]

[4] The motion to dismiss the City of Chino from this appeal, Dkt. 22, is granted.

OPINION OF JUSTICE NELSON, CONCURRING IN PART AND DISSENTING IN PART (FEBRUARY 7, 2023)

NELSON, R., Circuit Judge, Concurring in Part and Dissenting in Part:

I concur in the majority's holding to affirm the district court on Brown's unlawful arrest claim. But I dissent from the majority's holding to reverse the district court on Brown's excessive force claim. Assuming without deciding that the defendants used excessive force, the district court held that the unlawfulness of the defendants' conduct was not clearly established. *Brown v. County of San Bernardino*, No. 5:20-cv-01116 MCS (SPx), 2021 WL 5935476, at *3-4 (C.D. Cal. Oct. 14, 2021). I would affirm the district court on that basis.

To put this issue in context, the majority holds it is clearly established that police who encounter an unarmed grand theft auto suspect of small stature are forbidden from instructing the suspect to kneel for a few seconds and placing the suspect in handcuffs for a couple minutes while they verify automobile ownership and confirm nobody else is in the vehicle. We have never so held. And the majority's holding today threatens to chill future police enforcement and investigation in these serious cases. To be sure, handcuffing a well-behaved, unarmed, 83-year-old woman who complied with police direction may violate standards of societal decorum. In hindsight, it seems unnecessary. And grandmas around the country may rightfully wag an experienced finger chastising the police action here. But that is not the standard for

establishing a violation of the United States Constitution. More importantly, we have never held that, in these circumstances, instructing a grand theft auto suspect to kneel for a few seconds and handcuffing her for just three minutes while her ownership of the vehicle was verified and the vehicle was cleared constitutes excessive force under the Fourth Amendment.

To be clearly established, the question of whether the defendants' use of force was excessive must have been placed "beyond debate" by existing precedent. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (citation omitted). We can deny qualified immunity only if "a reasonable officer would have understood her conduct to be unlawful in that situation." *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

The majority holds that it was clearly established that police cannot use any force against a person who poses no threat. This mischaracterizes our precedent—and does so in far too generalized terms. *See Kisela*, 138 S. Ct. at 1152 ("This Court has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." (cleaned up)). The cases the majority cites to support this holding, *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 (9th Cir. 2007) and *Green v. City & County of San Francisco*, 751 F.3d 1039, 1049 (9th Cir. 2014), state that force is only justified when there is a "need for force." But whether a person posed a threat is not the only factor in determining whether force was needed—we must also consider "the severity of the crime at issue" and "whether [the suspect] is actively resisting arrest or

attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Here, as the majority points out, the "severity of the crime at issue"—stealing a vehicle—is "arguably severe." *See Green*, 751 F.3d at 1050. But according to the majority, *Green* clearly establishes that the crime of vehicular theft alone does not support using any force "when the suspect is outnumbered, unarmed, and compliant."

It is true that in *Green*, we found suspicion of a stolen vehicle alone insufficient to make the force used in that case constitutional, but we did not find that any force would have been unjustified. *See id.* (suggesting lower degrees of force the officers could have employed). A jury might find that suspicion of a stolen vehicle alone does not make the force used here constitutional either. But the question before us is whether it was clearly established that the force used here was unconstitutional. And there are marked differences between the force used in *Green* and the force used here.[1] So, while *Green* may clearly establish that the degree of force used in that case cannot be justified based on suspicion of a stolen vehicle alone,

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[1] It is not "beside the point" that *Green* involved a higher degree of force than that used here. The majority claims that under *Green*, the crime of vehicular theft alone does not justify using any force. That is not what *Green* says. In *Green*, we merely held that vehicular theft alone did not justify the force used there, not that any force was unjustified. *See Green*, 751 F.3d at 1050. It is very much to the point to explain why the differences in force between the two cases mean that *Green* does not clearly establish that the crime of vehicular theft alone foreclosed the lower degree of force used here.

it does not clearly establish that the degree of force employed here was unjustified on that basis.

The force employed in *Green* was far more intrusive than the force used against Brown. In *Green*, we determined the "degree of intrusion was . . . severe" because the suspect

> was ordered out of her vehicle by as many as six officers, many of whom pointed handguns and a shotgun directly at her. She was forced to her knees and handcuffed, which she had difficulty doing due to her knee problems, and officers continued to train weapons upon her while she was handcuffed on the ground. She estimates that she was in handcuffs for as many as ten minutes and states in deposition that the experience has caused her lasting psychological impact.

Id. at 1049. At least three of these key facts differ here. First, there is no evidence that Brown had knee problems or any other difficulty kneeling. Second, the defendants did not train their firearms on Brown while she was handcuffed; they briefly held their firearms at a "low ready" position and then merely kept their firearms unholstered. In *Green*, we approved this very firearm position as mitigating the degree of intrusion. *Id.* at 1050 (stating that the officers "could have held their weapons at a 'low ready' position rather than pointing them directly at [the suspect]."). It is hard to explain how officers who followed the direction in *Green* on this issue can now be found to have clearly violated our direction in *Green*. Third, while the suspect in *Green* was handcuffed for up to ten minutes, Brown was in handcuffs for no more than three. Indeed, she was released as soon as the

officers verified Brown owned the vehicle and confirmed nobody else was inside.

The majority also claims *Green* clearly establishes that when the government interests "do not support a need for force, 'any force used is constitutionally unreasonable.'" *See id.* at 1049 (quoting *Lolli v. County of Orange*, 351 F.3d 410, 417 (9th Cir. 2003)). Here, too, *Green* does not clearly establish that the government interests do not support a need for force because the interests here are different.

We assess the government interests by considering: "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (quoting *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994)). *Green* does not clearly establish that the government interests do not support a need for force here because the first factor—the severity of the crime at issue—is meaningfully different.

In *Green*, the officers conducted a high-risk stop based on an unconfirmed ALPR hit, meaning the license plate number on the suspect's vehicle was not actually listed in the stolen vehicle database. *Id.* at 1042-43. Here, by contrast, the defendants conducted a high-risk stop based on a confirmed ALPR hit—the license plate number on Brown's vehicle was confirmed to have been reported as stolen after the on-duty dispatcher ran the plate number through the California Law Enforcement Telecommunications System and contacted the San Bernardino County Sheriff's Department. Further, unlike the suspect in *Green* who was stopped driving "on Mission Street in San Francisco," *id.* at 1042, Brown was stopped outside a prison, which

the district court found is "a place known for stolen vehicles, weapons, and contraband." *Brown*, 2021 WL 5935476, at *3 (internal quotations and citation omitted).

The differences between *Green* and the facts here matter because "[u]se of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (per curiam)). These differences might not make the defendants' conduct here constitutional. This was a frightening experience for Brown. And the defendants may not have used perfect judgment in handcuffing her and instructing her to kneel. But what happened here is different from what happened in *Green*. These differences mean that *Green* does not "squarely govern[]" the specific facts here, so *Green* did not clearly establish that the defendants' use of force against Brown was unlawful. *See id.*

Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Id.* at 1152 (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam)). Regardless of whether the defendants used excessive force, that does not describe the defendants' conduct here. I respectfully dissent.

DISTRICT COURT JUDGMENT
(DECEMBER 15, 2021)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

ELISE BROWN, an individual,

Plaintiff,

v.

COUNTY OF SAN BERNARDINO, a municipal entity, CITY OF CHINO, a municipal entity, and DOES 1-10, Inclusive,

Defendants.

Case No.: 5:20-cv-01116-JGB-SP

Before: Mark C. SCARSI,
United States District Judge.

JUDGMENT

The Motion for Summary Judgment/Partial Summary Judgment filed by Defendant Officers Matthew Gregory and Madalyn Briley came on for hearing on August 2, 2021. On October 14, 2021, this Court granted Defendant Officer Matthew Gregory and Defendant Officer Madalyn Briley's Motion for Summary Judgment as to Plaintiff Elise Brown's First, Second, Third, and Fourth Claims for Relief on the grounds that the Defendant Officers are entitled to qualified immunity. (ECF No. 114.)

Defendant County of San Bernardino's Motion for Determination of Good Faith Settlement of Plaintiff Elise Brown's claims against the County came on for hearing on November 15, 2021. On November 17, 2021, this Court granted the County's motion. (ECF No. 129.)

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

The Court orders that judgment be entered in favor of Defendant Officer Matthew Gregory and Defendant Officer Madalyn Briley and against Plaintiff Elise Brown.

IT IS SO ORDERED.

/s/ Mark C. Scarsi
United States District Judge

DATED: December 15, 2021

ORDER GRANTING MOTION FOR GOOD FAITH SETTLEMENT AND DENYING STIPULATION TO STAY (NOVEMBER 17, 2021)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES — GENERAL

ELISE BROWN

v.

COUNTY OF SAN BERNARDINO

Case No.: 5:20-cv-01116-MCS-SP

Before: Mark C. SCARSI, United States District Judge.

Proceedings

(In Chambers) Order Granting Motion for Good Faith Settlement (ECF No. 113) and Denying Stipulation to Stay (ECF No. 125)

Defendant County of San Bernardino ("County") moves for an order determining that Plaintiff Elise Brown and Defendant County entered a settlement in good faith within the meaning of California Code of Civil Procedure section 877. (Mot., ECF No. 113.) Although Defendant Officers Gregory and Briley did not stipulate to good faith of the settlement, they did

not oppose. (*Id.* at 7.)[1] The Court heard the motion on November 15, 2021.[2]

To facilitate early and complete settlement in multi-party litigation, a federal court may determine that the settlement of a state-law claim was made in good faith under California Code of Civil Procedure sections 877 and 877.6. *See Mason & Dixon Intermodal, Inc. v. Lapmaster LLC*, 632 F.3d 1056, 1060 (9th Cir. 2011) (affirming district court's application of Cal. Civ. Proc. Code § 877, which constitutes substantive state law); *In re Heritage Bond Litig.*, 546 F.3d 667, 680 (9th Cir. 2008) (discussing purpose of Cal. Civ. Proc. Code § 877.6). To determine whether a settlement was made in good faith, courts weigh the following factors: (1) "a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability"; (2) "the amount paid in settlement"; (3) "the allocation of settlement proceeds among plaintiffs"; (4) "a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial"; (5) "the financial conditions and insurance policy limits of settling defendants"; and (6) "the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants." *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal. 3d 488, 499 (1985). If the settling parties make a prima facie showing of good faith, the burden of proof shifts to the party contesting the settlement to demonstrate that "the settlement is

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[1] The Officers were dismissed from the case on qualified immunity grounds two days after this motion was filed. (*See* ECF Nos. 113-14.)

[2] No counsel appeared to argue the motion. The Court admonishes the parties for failure to comply with Local Rule 7-14.

so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the statute." *Id.* at 499-500; *accord City of Grand Terrace v. Superior Ct.*, 192 Cal. App. 3d 1251, 1261 (1987).

The *Tech-Bilt* factors weigh in favor of a determination of good faith settlement. After arms-length negotiations between the parties before a federal panel mediator and continued informal settlement discussions, the County agreed to settle all claims against the County arising from the July 7, 2019 incident for a payment of $10,000 to Plaintiff. (Mot. 7, 11.) Accepting for the purpose of this motion the County's unopposed legal argument concerning its approximate proportionate liability and the estimated amount of Plaintiff's damages, (*id.* at 9-11), the settlement amount is within the reasonable range of the County's share of liability. Additionally, there is no suggestion that the settlement amount must include attorney's fees for Plaintiff because her only claim against the County is negligence. Finally, there is no evidence of collusion, fraud, or tortious conduct. Weighing these factors, the Court concludes that Plaintiff and the County entered their settlement in good faith pursuant to California Code of Civil Procedure sections 877.6.

The motion is granted. This determination bars any other joint tortfeasor or co-obligor from any further claims against the County for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. Cal. Civ. Proc. Code § 877.6(c).

All of Plaintiff's claims have been resolved through settlement, dismissal, or summary judgment. Accord-

ingly, the stipulation to stay the case pending appeal (ECF No. 125) is denied as unnecessary. The parties shall confer and file a proposed judgment within 14 days.

IT IS SO ORDERED.

ORDER GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (OCTOBER 14, 2021)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

ELISE BROWN, an individual,

Plaintiff,

v.

COUNTY OF SAN BERNARDINO, ET AL.,

Defendants.

Case No.: 5:20-cv-01116 MCS (SPx)

Before: Mark C. SCARSI,
United States District Judge.

ORDER GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [94]

Defendants Officer Matthew Gregory ("Officer Gregory") and Officer Madalyn Briley ("Officer Briley") (collectively, "Defendants") move for summary judgment on all causes of action against them or, alternatively, partial summary judgment. Mot. for Summ. J., ECF No. 94. Plaintiff Elise Brown ("Plaintiff") filed an Opposition and Defendants filed a Reply.[1] Opp'n, ECF

[1] Defendants also submitted objections to evidence. ECF No. 105. Some objected-to evidence is unnecessary to the resolution of

No. 101; Reply, ECF No. 103. The Court heard oral argument on August 9, 2021. ECF No. 106. For the following reasons, the Court GRANTS in part Defendants' Motion for Summary Judgment.

I. Background

Plaintiff Elise Brown ("Plaintiff") owns two vehicles. One vehicle is a cream-colored 2001 Oldsmobile Aurora and the other vehicle is a dark blue 1991 Oldsmobile Touring Sedan. Pl.'s Additional Material Facts and Supporting Evidence ("Pl.'s AMFSU") ¶ 1, ECF No. 101-2. Plaintiff reported the cream-colored vehicle as stolen. *See id*. On July 7, 2019, Plaintiff was driving the dark blue vehicle near a state prison when an automated license plate reader ("ALPR") read the vehicle's license plate and found that it correlated with a reported stolen vehicle. Def.s' Statement of Uncontroverted Facts and Conclusions of Law ("Def.s' SUFCL") ¶¶ 2, 3, 9. A public safety dispatcher confirmed the ALPR hit in the California Law Enforcement Telecommunications System and then with the San Bernardino County Sheriff's Department because that department was the "originating agency that entered the report." *Id*. ¶¶ 4-7. The public safety dispatcher then communicated this information to the on-air dispatcher, who in turn communicated this information to the police officers. *Id*. ¶¶ 7, 8; Decl. of Monique Gramillo ISO Mot. for Summ. J. ("Gramillo Decl.") ¶¶ 5-10; ECF No. 94-3.

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the Motion, and some supports facts not in dispute. As such, the Court need not resolve many of the objections at this time. To the extent the Court relies on objected-to evidence in this Order, the relevant objections are OVERRULED. *See Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119(E.D. Cal. 2006).

Upon receiving the report about the stolen vehicle, Sergeant McArdle, who is not a defendant, initiated a high-risk stop of Plaintiff's vehicle. Def.s' SUFCL ¶¶ 9, 120. Neither Officer Gregory nor Officer Briley initiated the high-risk stop, but they did assist with it. *Id*. ¶¶ 13, 120. Plaintiff immediately pulled over and never attempted to flee the police throughout the entire interaction. Pl.'s AMFSU ¶ 5. During the week of the incident, Officer Briley was a "trainee" in the Chino Police Department ("CPD") Field Training Officer ("FTO") Program and Officer Gregory was her FTO Officer. Decl. of Officer Briley ISO Mot. for Summ. J. ("Briley Decl.") ¶¶ 6, 8, ECF No. 94-4. Neither defendant could see "who was in the vehicle because of its dark tinted windows." Def.s' SUFCL ¶ 94. However, Sergeant McArdle broadcasted over the radio that "it looked like" only one person occupied the vehicle. Dep. Tr. of Sergeant McArdle, Ex. I to Diggs Decl. ("McArdle Dep. Tr."), 30:6-30:14, ECF No. 101-1. Officer Gregory heard this broadcast. Dep. Tr. of Officer Gregory, Ex. H to Diggs Decl. ("Gregory Dep. Tr."), 29:7-29:14, ECF No. 101-1.

Defendants stayed "behind their vehicle doors with firearms drawn in accordance with their training and standard police practices." Def.s' SUFCL ¶ 15. They also both pointed their firearms "in the direction of the stopped vehicle" while waiting for additional units to arrive. *Id*. ¶¶ 17-18. Once additional units arrived, Officer Briley used the PA system to command Plaintiff to exit the vehicle. *Id*. at ¶ 20. Officer Briley commanded Plaintiff "to turn off the vehicle; to throw the keys outside of the window; to stick both hands outside of the window; to open the car door from the outside of the vehicle with her left hand; and to step

outside of the vehicle facing away with her hands up." *Id.* ¶ 25. Officer Briley further instructed Plaintiff to " . . . lift the collar of her shirt with her right hand to reveal her waistband[] and to turn around in a circle to reveal her entire waistband area." *Id.* ¶ 26. Next, "Officer Briley instructed Plaintiff to walk back towards the sound of her voice." *Id.* ¶ 28. Officer Briley pointed her firearm at Plaintiff and placed "her finger on the frame of the firearm, outside of the trigger guard." *Id.* ¶ 31. While Officer Briley gave these commands, Officer Gregory kept his firearm at a "low-ready position" and "not pointed at Plaintiff."[2] *Id.* ¶ 47. Once Plaintiff was close to Officer Briley, Officer Briley placed her firearm in her holster and grabbed her handcuffs. *Id.* ¶ 32. Officer Gregory then started giving commands to Plaintiff. *Id.* Though Officer Gregory considered not ordering Plaintiff to get to her knees, he ultimately decided to order Plaintiff to get on her knees while Officer Briley handcuffed her.[3] *Id.* ¶¶ 32, 33; Body Worn Camera Video of Officer Briley, Ex. A to Diggs Decl. ("Briley BWC Part 1"), at 12:10-12:18, ECF No. 101-1. Officer Gregory later stated Plaintiff still could have been "safely [] taken into custody" if she was only standing and not

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[2] Officer Scott, a non-defendant, also appears to have displayed a weapon while Officer Briley gave commands to Plaintiff. Body Worn Camera Video Part 1 of Sergeant McArdle, Ex. C to Diggs Decl. ("McArdle BWC Part 1"), at 4:21, ECF No. 101-1.

[3] Plaintiff also alleges that even after she had handcuffs on, Officer Scott continued to aim his weapon at her while a police officer walked her back to the police vehicles. Pl.'s AMSFU ¶ 16. However, the cited evidence for this allegation does not support this proposition and does not involve Defendants. *See* Dep. Tr. of Elise Brown, Ex. F. to Diggs Decl. ("Brown Dep. Tr."), 59:15-60:21, ECF No. 101-1.

on her knees. Dep. Tr. of Officer Gregory, Ex. H. to Diggs Decl. ("Gregory Dep. Tr."), 86:24-87:4, ECF No. 101-1.

Plaintiff was on her knees for less than twenty seconds. *Id.* ¶¶ 71, 72. Officer Briley had Plaintiff in her custody for "approximately thirty-eight seconds" until Officer Briley "released Plaintiff into the custody of Officer Barber." *Id.* ¶ 83. Plaintiff was in handcuffs for "approximately three minutes" before Officer Barber released her from handcuffs. Def.'s SUFCL ¶¶ 84-87. Other police officers then took Plaintiff back to the parked police vehicles but no police officer ever placed Plaintiff in a police vehicle. Def.s' SUFCL ¶ 37. There were at least seven police officers present at the scene during this incident. Pl.'s AMFSU ¶ 9. Though Officers Briley and Gregory assumed Plaintiff was in her fifties or sixties, Plaintiff disputes that they had this assumption because Sergeant McArdle, standing in close proximity to Defendants while Plaintiff got out of her car, stated Plaintiff was an "old female." *See* Def.s' SUFCL ¶¶ 36, 57; *but see* McArdle BWC Part 1 at 5:33.

Throughout this incident, Plaintiff complied with all of Officer Briley's commands and "did not appear to . . . have any mobility or comprehension issues." Def.s' SUFCL ¶ 29. Other police officers at the scene discovered that a mistake in the stolen vehicle reporting led to this incident, explained this to Plaintiff, and advised Plaintiff on how to correct the mistake. Body Worn Camera Video Part 1 of Sergeant McArdle, Ex. D to Diggs Decl. ("McArdle BWC Part 2"), 0:31-1:31 ECF No. 101-1. Plaintiff brings claims against Defendants pursuant to 42. U.S.C. § 1983 for excessive force and unreasonable seizure, detention, and arrest.

II. Legal Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). A fact is material when, under the governing law, the resolution of that fact might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The burden of establishing the absence of a genuine issue of material fact lies with the moving party, *see Celotex*, 477 U.S. at 322-23, and the court must view the facts and draw reasonable inferences in the light most favorable to the nonmoving party, *Scott v. Harris*, 550 U.S. 372, 378 (2007). To meet its burden, "[t]he moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). Once the moving party satisfies its burden, the nonmoving party cannot simply rest on the pleadings or argue that any disagreement or "metaphysical doubt" about a material issue of fact precludes summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). There is no genuine issue for trial where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *Id.* at 587.

III. Discussion

Defendants seek qualified immunity. Mot. 24-27.[4] Qualified immunity protects "government officials performing discretionary functions" by "shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987). Determining whether police officers are entitled to qualified immunity is an issue the Court "must resolve . . . 'at the earliest possible stage in litigation.'" *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011) (quoting *Pearson v. Callahan,* 555 U.S. 223, 232, 129 S. Ct. 808, 815, 172 L.Ed.2d 565 (2009)).

"An officer will be denied qualified immunity in a § 1983 action only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood her conduct to be unlawful in that situation." *Torres*, 648 F.3d at 1123. Courts have discretion to consider either prong first. *Pearson*, 555 U.S. at 236. Police officers are entitled to qualified immunity "[i]f the answer to either prong is no." *Santibanez v. City of Los Angeles*, No. 2:17-cv-

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[4] Defendants' Motion is twenty-seven pages. *See generally*, Mot. Defendants did not seek leave to file a motion longer than the maximum twenty-five pages. Initial Standing Order § 9(d). Plaintiff did not object to this length and the Court will accept the filing. However, the Court admonishes Defendants to comply with all rules in future filings.

04189-ODW-JCx, 2018 WL 4261893, at *6 (C.D. Cal. Sept. 6, 2018).

The Court starts its analysis with the second prong of qualified immunity. Under the second prong, "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (quoting *Creighton,* 483 U.S. at 640). Courts often look for whether there is a "case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *Id.* Preceding cases do not have to have "materially similar factual circumstances or even facts closely analogous" to the current case but should make it "sufficiently clear such that any reasonable official" would have understood they were violating the Fourth Amendment. *Reese v. Cnty. of Sacramento*, 888 F.3d 1030, 1038 (9th Cir. 2018) (quotation marks and citations omitted).

The Court will now address whether Defendants should receive qualified immunity.

Assuming *arguendo* that both Defendants violated Plaintiff's constitutional rights by unlawfully seizing and detaining her or by using excessive force, they are still entitled to qualified immunity. First, Plaintiff argues that the Court should not grant Defendants qualified immunity because the Ninth Circuit in *Green v. City & Cnty. of San Francisco*, 751 F.3d 1039 (9th Cir. 2014) ("*Green*") denied qualified immunity to a defendant in a case with "materially indistinguishable" facts and because the Ninth Circuit "found that the rights at issue in the *Green* case were clearly established at the time of the 2009 incident giving rise to the case." Opp'n 19. The Court disagrees with both views.

First, the facts of both cases are not "materially indistinguishable." In *Green*, the police only had an unconfirmed hit from an ALPR that misread a license plate whereas here, Sergeant McArdle received a confirmed ALPR hit. *See Green*, 751 F.3d at 1043, 45; *but see* Def.s' SUFCL ¶ 4. In *Green*, the plaintiff was "5'6" and 250 pounds" and struggled to kneel because of "knee problems" whereas here, Plaintiff did not have any visible physical issues with kneeling and did not struggle to get to her knees. *Green*, 751 F.3d at 1043; *but see* Pl.'s AMFSU (failing to provide any evidence Plaintiff struggled to kneel or stand up after kneeling). In *Green*, the plaintiff was possibly in handcuffs for as long as twenty minutes whereas here, Plaintiff only had handcuffs on for about three minutes. *See Green*, 751 F.3d at 1044; *but see* Def.s' SUFCL ¶ 87. In *Green*, the plaintiff was driving "on Mission Street in San Francisco" whereas here, Plaintiff was driving near a prison, a place known for "stolen vehicles, weapons, and contraband." *See Green*, 751 F.3d at 1042; *but see* Def.s' SUFCL ¶ 9; *see also* Reply 7. And, in *Green*, the police sergeant that made the decision to conduct a high-risk stop was also the same police sergeant who issued commands and handcuffed the plaintiff whereas here, Defendants followed Sergeant McArdle's decision to conduct a high-risk traffic stop. *See Green*, 751 F.3d at 1043; *but see* Def.s' SUFCL ¶ 9.

Second, Plaintiff misstates the holding of *Green* by stating that it "found that the rights at issue . . . were clearly established at the time of the 2009 incident giving rise to the case." Opp'n 19. In *Green*, the Ninth Circuit reversed the district court's granting of summary judgment against the plaintiff on the unlaw-

ful seizure, de facto arrest without probable cause, and excessive force claims because "it [could not] be determined as a matter of law that Green's Fourth Amendment rights were not violated." *Green*, 751 F.3d at 1051. Instead, the Ninth Circuit found that the claims should "be determined by a jury." *Id.* As for whether the initiating police sergeant should receive qualified immunity, the Ninth Circuit found it could not make a determination on qualified immunity "as a matter of law" and said the "question must go before a jury." *Id.* at 1053. *Green* did not find that any rights were clearly established in the situation that gave rise to the case.

Given both the material differences between *Green* and this case as well as *Green's* ruling on qualified immunity, the Court finds that *Green* does not prevent Defendants from receiving qualified immunity for both the excessive force claim and the unreasonable seizure, detention, and arrest claim. Further, Defendants are entitled to qualified immunity for the unreasonable seizure, detention, and arrest claim because there is "no evidence or case law that clearly establishes that a high-risk stop is an unreasonable level of intrusiveness for a suspected stolen vehicle." *Theney v. City of Los Angeles*, No. CV 15-9602-AB (AFMX), 2017 WL 10743001, at *9 (C.D. Cal. June 19, 2017) (granting qualified immunity to police sergeants involved in a high-risk stop even when "it remain[ed] a question for the jury as to whether those tactics elevated the stop to an arrest absent probable cause"). For the excessive force claim, neither Officer Briley nor Officer Gregory acted in such a way that "a reasonable officer would have understood [their] conduct to be unlawful in that situation." *Torres*, 648 F.3d at

1123. Officers Gregory and Briley participated in the stop near a prison and followed all training procedures during the incident. Though Plaintiff argues that Officer Gregory acted with excessive force by standing over her "with his gun aimed downward at her while she was kneeling and being restrained in handcuffs" and keeping his gun "unholstered" while walking back to the police vehicles, the evidence does not support that he aimed his gun downward at Plaintiff. Pl.'s AMSFU ¶ 15 (citing McArdle BWC Part 1 at 7:24-7:43 and Brown Dep. Tr. 60:7-60:21). Instead, the evidence Plaintiff cites as support for this inference shows that Officer Gregory had his gun pointed at the ground and not her body. McArdle BWC Part 1 at 7:24-7:43; *Harris*, 550 U.S. at 380 ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); *Gomez v. City of Los Angeles*, No. CV 19-4718 PA (GJSx), 2020 WL 4032673, at *5 (C.D. Cal. Mar. 27, 2020) (applying *Harris* to evidence from body worn camera videos). Officer Gregory's positioning of his gun in this circumstance did not violate clearly established law. *Cf. Robinson v. Solano Cnty.*, 278 F.3d 1007, 1015 (9th Cir. 2002) (stating that " . . . pointing a gun to the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment, especially where the individual poses no particular danger") (emphasis added). And though Plaintiff argues *Green* shows that it is clearly established that the officers' conduct violated the law, *Green* does not support Plaintiff's position. *Supra.*

Alternatively, Officers Gregory and Briley are both entitled to qualified immunity because both were acting at the direction of Sergeant McArdle, an officer who gave "facially valid direction[s]". *See Theney*, 2017 WL 10743001, at *9; *see also United States v. Robinson*, 536 F.2d 1298, 1299 (9th Cir. 1976). "A facially valid direction from one officer to another to stop a person or a vehicle insulates the complying officer from assuming personal responsibility or liability for his act done in obedience to the direction." *Robinson*, 536 F.2d at 1299. This Court in *Theney* granted qualified immunity to two police officers who "acted on the direction of" a third officer. *Theney*, 2017 WL 10743001, at *9. The third officer made the call "for a helicopter, a supervisor, and backup" and the district court granted qualified immunity to the responding officers for following a "facially valid direction" despite the possibility of a constitutional violation. *See id.* at *2, *9. In contrast, the defendant in *Green* initiated the high-risk stop. *Green*, 751 F.3d at 1043 ("Sergeant Kim then decided to make a 'high-risk' or 'felony' stop.") Here, Sergeant McArdle initiated the high-risk stop and Defendants assisted with the stop. Def.s' SUFCL ¶¶ 9, 13. Sergeant McArdle's initiation of the high-risk stop was a "facially valid direction" given to Defendants. *Robinson*, 536 F.2d at 1299. That Officer Gregory decided to have Plaintiff kneel does not change the fact that he was still acting pursuant to Sergeant McArdle's direction to conduct a high-risk stop. Gregory Dep. Tr. 80:4-11; 81:10-14 (stating that while officers usually order individuals to get on their knees during a high-risk stop, there are certain instances during a high-risk stop where an officer will not give that order). The potential color and model discrepancy, as well as the Sergeant

McArdle's comment that Plaintiff was an "old female," also does not change this analysis because Officers Gregory and Briley were still following Sergeant McArdle's direction. *Robinson*, 536 F.2d at 1299; Decl. of Officer Gregory ISO Mot. for Summ. J ("Gregory Decl.") ¶¶ 18, 34, ECF No. 94-5 (providing reasons for why a color discrepancy may exist after receiving a license plate match and stating that Plaintiff "appeared to be . . . in her mid-to late 50's"); Decl. of Officer Briley ISO Mot. for Summ. J ("Briley Decl.") ¶ 30, ECF No. 94-4 (stating she perceived Plaintiff to be "in her mid-to late-50's"); McArdle BWC Part 1 at 5:35 (identifying Plaintiff as an "old female).[5]

Though Plaintiff experienced an unfortunate encounter with police officers on July 7, 2019, the law was not clearly established at the time of the incident that Defendants' actions were "unlawful in that situation." *Torres*, 648 F.3d at 1123. The Court thus grants qualified immunity on that basis and declines to analyze whether Plaintiff suffered any constitutional violations. *Pearson*, 555 U.S. at 237; *Santibanez*, 2018 WL 4261893, at *6.

IV. Conclusion

For the foregoing reasons, the Court GRANTS qualified immunity to Officers Gregory and Briley and declines to address other parts of Defendants' Motion for Summary Judgment.

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[5] Officer Briley also followed, at least in part, Officer Gregory's "facially valid direction" and could likely be given qualified immunity on that basis as well. *Robinson*, 536 F.2d at 1299; Gregory Decl. ¶¶ 24, 29 (outlining some of Officer Gregory's directions given to Officer Briley).

IT IS SO ORDERED.

/s/ Mark C. Scarsi
United States District Judge

Dated: October 14, 2021

ORDER DENYING PETITION FOR REHEARING (MARCH 17, 2023)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELISE BROWN, an individual,

Plaintiff-Appellant,

v.

COUNTY OF SAN BERNARDINO, a municipal entity; CITY OF CHINO, a municipal entity; MATTHEW GREGORY, Officer; MADALYN BRILEY, Officer; DOES, 3-10, inclusive,

Defendants-Appellees.

No. 21-56357

D.C. No. 5:20-cv-01116-MCS-SP
Central District of California, Riverside

Before: BERZON, R. NELSON, and BADE, Circuit Judges.

ORDER

Judge Bade and Judge Berzon have voted to deny the appellees' petition for rehearing. Judge Nelson has voted to grant the petition for rehearing. Judge Bade has voted to deny the appellees' petition for

rehearing en banc, and Judge Berzon has so recommended. Judge Nelson has voted to grant the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc are denied.